



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

June 20, 2011

Richard J. Muraski, Jr.
Colonel, Corps of Engineers
Fort Worth District
819 Taylor Street, Room 3437
P.O. Box 17300
Fort Worth, Texas 76102-0300

Dear Colonel Muraski:

In accordance with our responsibilities under Section 309 of the Clean Air Act, the National Environmental Policy Act (NEPA), and the Council on Environmental Quality (CEQ) regulations for implementing NEPA, the U.S. Environmental Protection Agency (EPA) Region 6 office in Dallas, Texas, has completed its review of the Final Environmental Impact Statement (FEIS) prepared by the Fort Worth District Corps of Engineers for the Rusk Permit Area Expansion of the existing South Hallsville No. 1 Mine. The Sabine Mining Company, a subsidiary of the North American Coal Corporation, proposes to construct, operate, and reclaim the Rusk Permit Area.

The proposed action requires an Individual Permit from the U.S. Army Corps of Engineers for the discharge of dredged and fill material into waters of the U.S. under Section 404 of the Clean Water Act. The Corps of Engineers is the lead Federal agency preparing the DEIS. The U.S. Fish and Wildlife Service, the EPA, and the Texas Parks and Wildlife Department are cooperating agencies.

EPA Region 6 provided comments on the Draft EIS dated December 17, 2010. EPA rated the DEIS as "EC 2," i.e., EPA had "Environmental Concerns to the Proposed Permitting Action and Requested Additional Information." EPA is pleased that the FEIS includes additional analysis of the proposed action. However, EPA continues to have environmental concerns specific to wetland mitigation, and Environmental Justice and Tribal issues.

Our enclosed detail comments are offered to explain our remaining concerns and to insure full compliance with the requirements of NEPA, Section 404 of the Clean Water Act, and the CEQ regulations. EPA asks that these comments be addressed and responded to in the Record of Decision Document (ROD) and complied with prior to the issuance of the Section 404 permit. EPA appreciates the opportunity to review the FEIS. If you have any questions, please contact Mike Jansky of my staff at (214) 665-7451 or by e-mail at jansky.michael@epa.gov for assistance.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Rhonda", is written over a horizontal line.

Rhonda M. Smith, Chief
Office of Planning and
Coordination

Enclosure

**DETAILED COMMENTS ON THE
U.S. ARMY CORPS OF ENGINEERS
FORT WORTH DISTRICT
FINAL ENVIRONMENTAL IMPACT STATEMENT
FOR THE
SABINE MINING COMPANY RUSK PERMIT AREA
RUSK, HARRISON AND PANOLA COUNTIES, TEXAS**

BACKGROUND: Sabine Mining Company proposes to construct, operate, and reclaim an expansion of the South Hallsville No. 1 Mine. The new 20,377 acre-area is located south of the existing mine and across the Sabine River into Rusk and Panola counties, Texas. Surface mining operations would continue with conventional open pits excavated by large draglines and supported by standard earth moving equipment such as loading shovels, dozers, end dumps, and scrapers. EPA Region 6 provided comments on the Draft EIS dated December 17, 2010.

COMMENTS: The following are offered on the FEIS for your agency's consideration in finalizing the Record of Decision Document and Issuance of the Section 404 Permit.

SECTION 404 PERMIT (SWF-2007-00560)

EPA continues to have environmental concerns with regard to wetland impacts as addressed in the FEIS. EPA's comments are based on our original concerns listed below and the information provided in the FEIS, specifically in Appendix G, Draft EIS Public Comments and Responses and Appendix C, Proposed Conceptual Mitigation South Hallsville No. 1 Mine Rusk Permit Area.

EPA Region 6 provided substantial Section 404 comments on the Draft EIS and had significant concerns on the following issues:

1. The conditional assessment methods utilized in the EIS had not been previously used or calibrated for use in the project area. The term "Functional Assessment" was used incorrectly to describe the methodologies. The incorrect use of reclaimed wetlands and streams as "reference" for evaluating mitigation requirements (compensatory mitigation acres and linear feet).
2. Lack of hydric soils for reclamation.
3. Mitigation credit for incremental mining.
4. Lack of detail for location and design of mitigation features.
5. Sabine River Crossing/Transportation and Utility Corridor.
6. Failure to identify linear feet of stream impacts.
7. Use of long-term site protection for mitigation areas.

Conditional Assessment Methods

EPA has discussed the authorization of the assessment methods with the Fort Worth District Corps of Engineers (COE). Based on that discussion and EPA's inability to verify or deny that earlier meetings between the agencies may have resulted in an agreement to allow the methods used in this project, EPA withdraws its concerns on this matter.

The applicant has proposed the following mitigation ratios to offset project impacts; 2:1 for forested wetlands, 1:1.5 non-forested wetlands and 1:1 for streams. While EPA does not favor the approach used to justify those ratios, EPA does believe the ratios would be adequate provided that the performance standards for determined mitigation success are based on natural reference site conditions (Standards) and not those sites used in the assessment as “reference” at the South Hallsville Mine.

EPA notes that the FEIS page 2.49 states, “Sabine, in coordination with the USACE, would identify and inventory appropriate waters of the U.S. (including wetlands) reference sites for use in evaluating reclamation success for developed water resources in the proposed Rusk Permit Area. The reference sites would be specific to the project’s Section 404 permit requirements.” This statement indicates that at some point (perhaps after permit issuance) an inventory of natural wetlands and streams would be conducted for the purpose of establishing mitigation performance standards. EPA believes that such action must occur prior to issuance of a permit to ensure that the permit conditions clearly establish the level of mitigation performance required for permit compliance.

Hydric Soils

EPA’s concern for the lack of storage and reuse of hydric soils in reclamation for wetlands to help ensure success still remains. However, if a special permit condition is included in the permit that requires that all mitigation lands meet the regulatory criteria for determining jurisdiction, i.e. the three parameters of a wetland (presence of hydric soils, sufficient hydrology and predominance of hydrophytic vegetation) EPA will withdraw its concern.

Mitigation Credit for Incremental Mining

EPA accepts the clarification offered in Appendix G, F2-4 with regard to incremental losses.

Location and Design of Mitigation Features

Regarding proposed location and design of mitigation features, the FEIS does not identify specific locations for wetland and mitigation features and only provides general descriptions as to mitigation designs (both streams and wetlands). As to addressing the location of mitigation features, apparently the lack of long term control of lands leased for coal extraction prevents the applicant from ensuring such features will be incorporated during reclamation or if incorporated then protected, as required by the current mitigation guidance, with a conservation easement. The applicant has stated that the Clean Water Act 404 program would be sufficient to protect the mitigation lands once released from bond. However, 404 only “protects” from activities that involve placement of fill into waters of the U.S. It does not protect from mismanagement or ecological degradation. However, since the nature of the project is not to permanently convert waters of the U.S. but to extract subsurface resources and then return the landscape to pre-mine uses, EPA does not believe it warrants any more mitigation beyond that required to offset the initial impacts and temporal losses incurred during the reclamation timeline.

Stream Impacts and Mitigation

The most critical remaining concern for EPA is stream restoration. It has become apparent that little has been done in the past 30 years of surface mining in Texas in the way of successfully restoring streams. What has in most cases been called stream restoration has been the creation of highly engineered grassed waterways often with large concrete grade stabilization structures. EPA is aware that at least one mining company in Texas is now designing streams using natural stream channel design principles in its reclamation work but that work has yet to be fully completed. Additionally, EPA is

aware that the mining industry claims that the Railroad Commission of Texas, Surface Mining and Reclamation Division (RCT) has prevented mining companies from practicing natural stream channel restoration because the RCT considers bed and bank channels erosion and as such not allowed. EPA was concerned that such a policy or rule was in direct conflict with the CWA and 404 mitigation requirements. In an effort to determine if such a situation existed, EPA contacted the RCT. John E. Caudle, Director of the Surface Mining and Reclamation Division was contacted and participated in a field visit to a mining company near Jewett, Texas at which he clearly articulated that the RCT was in fact supportive of natural stream channel reclamation and that the development of channel bed and bank features was not prohibited, but in fact they are encouraged.

During a meeting with the applicant on this topic, the applicant maintained the position that the RCT would not allow for natural stream channel design that involved a bed and bank feature. Instead they want to construct a flat bottom trapezoidal channel with the hopes that over time a channel will form on its own and that once vegetated the RCT would not require that it be leveled and grassed.

The RCT has made it quite apparent to EPA that there is no conflict in reclaiming streams utilizing natural stream channel design to ensure appropriate dimension, pattern and profile for the size of stream type needed in relationship to the watershed size. While the FEIS conceptual mitigation plan suggests that natural stream channel design will be used, the plan also would allow for a grassed waterway to be created. In fact such a waterway would meet the proposed performance standards listed on page 18 of Appendix C, Conceptual Mitigation Plan: (1. Stream channels will not exhibit adverse impacts from erosion, headcutting, and excessive silt accumulation. 2. Planted riparian zones will be measured to ensure they exhibit the following: a minimum of 25 feet on either side of created ephemeral streams, a minimum of 50 feet on either side of created intermittent streams, a minimum of 100 feet on either side of created perennial streams.)

EPA believes that those performance standards do not establish an appropriate standard for mitigation success. EPA strongly recommends at the minimum that the following be added as performance measures: Stream mitigation will be considered successful if the restored stream banks are stable with no substantial degradation, the stream is maintaining the pattern, profile and dimension of the reference reach stream, riparian buffer vegetation is achieving the reference reach target habitats in plant species diversity, density and structure, and stream habitats and aquatic populations indicate a positive trend in composition, density, and diversity.

Sabine River Crossing and Linear Feet Stream Impacts

The Sabine Crossing Walkway and Haul Road are two features that pose long-term impacts. EPA understands that between crossings (moving draglines) that the walkway will be removed from jurisdictional areas and that several stockpiles will be maintained on non-jurisdictional areas in the active floodplain. During subsequent crossings the material would be reused to re-form the walkway. After the last crossing all material will be removed from the floodplain and the disturbed area will be resorted to forested wetlands. EPA also understands that the Haul Road will span the Sabine floodplain and consist of a bridge and elevated roadway utilizing multiple 10 foot culverts. EPA recommends that during the life of the walkway and Haul Road that monitoring be conducted up and down stream of the structures on an annual basis and following any out of bank flow of the Sabine River for changes in the dimension, pattern and profile of the Sabine River. The monitoring should be conducted by a certified fluvial geomorphologist. Annual and major flood event reports should be provided to the Corps of Engineers indicating channel and floodplain stability and any corrective actions taken to address impacts resulting from the structures. EPA acknowledges that the FEIS has included linear calculations for stream impacts.

EPA understands the walkway will be removed when the last dragline has crossed. However, it is not clear from the FEIS as to what will happen to the Haul Road. EPA recommends that it be removed since the purpose of the road will have ended. If however, the road is to remain in place, then additional mitigation would be warranted as the impacts would be permanent.

As touched on in our remarks above in #4., the majority of impacts resulting from this project are temporary in the sense that the purpose of the project is not to permanently fill waters of the U.S., EPA believes that only those areas that may be permanently impacted by fill or hydrologic alteration such as the area to be impacted by the Haul Road and Walkway require mitigation secured by a conservation easement.

Conclusion

EPA believes that until its remaining Section 404 permit concerns listed above are satisfactorily addressed the project does not fully comply with the 404(b)(1) Guidelines. Issuance of the Section 404 permit should be conditional with modifications to address these remaining concerns. If you have any technical questions concerning these comments, please contact Richard Prather at 214-665-8333.

ENVIRONMENTAL JUSTICE ASSESSEMENT

Although this FEIS makes clear the financial benefit that the impacted counties will receive, the Office of Environmental Justice and Tribal Affairs has some general and specific concerns regarding environmental and Tribal issues, including the following:

Lease or Purchase of Land/Residences

The EIS implies that landowners in the permit area will be forced to either lease or sale their property. Apparently the 256 dwellings would be torn down whether the land is sold or leased. Residents made clear their displeasure during the public meeting. The residents will have to relocate to areas of their choice, provided they can afford housing and/or land. The EIS states that there is ample housing available in the general area, as well as 300 undeveloped acres near Tatum.

The cost of land and housing has greatly increased, however, since most of the residents located in the permit area. The lease or purchase money they receive may offset that cost, but it will entail a complete disruption of their lives for several years or a loss of their way of life if they have to move into a city from this bucolic rural area. "Residents . . . would be displaced for the duration of project operations (30 years) and reclamation (approximately 5 years)." This area is located in Block Group 1 in Census Tract 9501. The percentage of African Americans living there is 18.9% compared with the State's 11.3%. This Block Group also has a 18.4% Hispanic population, compared with the State's 32%; however the four counties where the project is located have Hispanic populations of only 3.5%, 5.3%, 8.4% and 9.1% . Since Block Group 1 only a 13.1% rate of those living below the poverty line, the EIS concludes that no disparate adverse impacts will be experienced by low-income and minority populations. A closer look is merited. This Block Group will experience a disproportionate and, in many ways, adverse impact of this project compared with others impacts experienced by others living elsewhere. The EIS states that the residents can negotiate the terms of the lease or sale with the mining company. It is likely that residents who are undereducated, politically naïve, inexperienced in finance/business and many possibly with limited English language skills will not be capable of negotiating the best terms possible for themselves with the company attorneys. This will be an additional disproportionate adverse impact on Block Group 1 of Census Tract 9501.

Groundwater Drawdown

Because of the 30 – 150 feet excavation of the pit mines, it will be necessary to remove water in the bottom of the pits. An estimated 5 feet of water drawdown from the Carrizo-Wilcox aquifer is expected to occur. It will extend about 2,000 feet north of the town of Tatum, just to the south of the permit area. This will cause springs, seeps, and small creeks to dry up, along with shallow water wells in the area. Although many of the residents are clients of a small water supply corporation, they still depend on well water for their farm animals, gardens, and for their pasture land, and many of these are low income residents, since 13.1% of the residents of Block Group 1 of Census Tract 9501 (within the permit area) are low income. Small Crystal Farms Water Supply of Tatum, which services this area, will be severely impacted by the relocation of residents in the permit area, and will be forced to cease operations, according to comments made at the public meeting. Although the mining company will replace well water, etc., it is not clear how this small water supply corporation will be compensated when its customers are relocated.

Demographics

Of the 10 Block Groups of Census Tracts in or adjacent to the permit area, 7 have African American populations that far exceed those of the State's (11.3%, US Census, 2000). These are the percentages of African Americans within those Block Groups: 31.2%, 35.6%; 23.4%, 25.6%, 37.1%, 18.9%, and 22.4%. Only one (18.9%) is less than two times the State rate, and three are approximately three times the State rate. Of these, Block Group 2 of Census Tract 9502, in Panola County, with its 37.1% African American population, has a 18.2% rate of those living below the poverty level, in contrast with the State's 15.4%. In Block Group 4 of Census Tract 9501, the Hispanic population is 22.5%. Although this is lower than the State's rate of 32%, the four counties (and 8 of the 10 Block Groups of Census Tracts) have much lower Hispanic percentages. Gregg County has a 9.1% Hispanic population, Harrison County has 5.3%, Rusk County has 8.4%, and Panola County has a 3.5% Hispanic population. The town of Tatum itself has a 17.6% Hispanic rate and Block Group 4 of Census Tract 9501, not only has a 22.5% Hispanic population rate, it also has a 28% rate of those under the poverty level, (compared with the State's 15.4%). Because of these statistics, coupled with the fact that these communities will bear the brunt of the adverse impacts brought about by the mine's construction, operation and reclamation activities, additional mitigation efforts should be undertaken. Some of the adverse impacts include the apparently forced relocation of some residents, and the excess noise, dust, traffic and dangers of heavy equipment operation experienced especially by those in or near the permit area during the sequential construction/mining/reclamation efforts. Those living away from the permit area will not experience these adverse conditions, and those living nearby will experience them to a lesser degree. Moreover, the minority and low-income residents will suffer more from any negative impacts than will others because of their increased vulnerability and lack of many of the resources needed to withstand these challenges.

Conclusion

We conclude these facts contradict the EIS's conclusion that "... analyses have not identified adverse environment effects that would disproportionately affect these minority communities." The mitigation plan should be modified to take into account these concerns and fully addressed in the Record of Decision Document. If you have any technical questions concerning these EJ comments, please contact Nelda Perez at 214-665-2209 for assistance.

TRIBAL ISSUES

EPA has been contacted by the Caddo Nation Tribal Historic Preservation Officer (THPO) regarding cultural resources of importance to the Tribe in the mining and surrounding areas. The Caddo Nation has a history of occupation in the area as evidenced by the discovery of significant sites in the original mining area which is adjacent to the new proposed expansion site for which this permit covers. Section IV.D. Of the Memorandum of Agreement between Texas Commission on Environmental Quality (TCEQ) and EPA states that TCEQ agrees to mail a copy of draft permits to the State Historic Preservation Officer (SHPO). Although we do not know at this time whether or not there may be cultural resources of importance to the Caddo Nation within the proposed permit area, and because of the equivalent legal status and the authority of the THPO and SHPO per section 102(d)(2) of the National Historic Preservation Act, EPA requests that TCEQ provide the THPO with an opportunity to comment, if it has not already done so.

In addition, while the Caddo have established a former presence, EPA suggests efforts be made to inform/contact additional Tribes who may also have historical ties to the area. This may have already occurred, but if not, a list of Tribes with contact information is at the bottom of this page. In closing, we suggest allowing the below listed Tribes determine for themselves whether or not they may have interest in the area. We suggest the following tribes also be contacted if they haven't already:

Quapaw Tribe of Oklahoma
P.O. Box 765
Quapaw, OK 74363
Ph.: 918-542-1853
Fax: 918-542-4694

Comanche Nation
P.O. Box 908
Lawton, OK 73502
Ph: 580-492-4988
Fax: 580-492-3796

Alabama-Coushatta Tribe of Texas
571 State Park Road 56
Livingston, TX 77351
Fax: 318-253-9791
Fax: 936-563-1139

Jena Band of Choctaw Indians
P.O Box 14
1052 Chanaha Hina St.
Jena, La 71342
Ph: 318-992-2763